

First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

## SENATE ENROLLED ACT No. 612

AN ACT to amend the Indiana Code concerning labor and safety.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 22-4-4-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. (a) Except as otherwise provided in this section, "wages" means all remuneration as defined in section 1 of this chapter paid to an individual by an employer, remuneration received as tips or gratuities in accordance with Sections 3301 and 3102 et seq. of the Internal Revenue Code, and includes all remuneration considered as wages under Sections 3301 and 3102 et seq. of the Internal Revenue Code. However, the term shall not include any amounts paid as compensation for services specifically excluded by IC 22-4-8-3 or **IC 22-4-8-3.5** from the definition of employment as defined in IC 22-4-8-1 and IC 22-4-8-2. The term shall include, but not be limited to, any payments made by an employer to an employee or former employee, under order of the National Labor Relations Board, or a successor thereto, or agency named to perform the duties thereof, as additional pay, back pay, or for loss of employment, or any such payments made in accordance with an agreement made and entered into by an employer, a union, and the National Labor Relations Board.

(b) The term "wages" shall not include the following:

- (1) That part of remuneration which, after remuneration equal to seven thousand dollars (\$7,000), has been paid in a calendar year to an individual by an employer or his predecessor with respect to employment during any calendar year subsequent to December

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31, 1982, unless that part of the remuneration is subject to a tax under a federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund. For the purposes of this subdivision, the term "employment" shall include service constituting employment under any employment security law of any state or of the federal government. However, nothing in this subdivision shall be taken as an approval or disapproval of any related federal legislation.

(2) The amount of any payment (including any amount paid by an employer for insurance or annuities or into a fund to provide for any such payment) made to, or on behalf of, an individual or any of ~~his~~ **the individual's** dependents under a plan or system established by an employer which makes provision generally for individuals performing service for it (or for such individuals generally and their dependents) or for a class or classes of such individuals (or for a class or classes of such individuals and their dependents) on account of:

- (A) retirement;
- (B) sickness or accident disability;
- (C) medical or hospitalization expenses in connection with sickness or accident disability; or
- (D) death.

(3) The amount of any payment made by an employer to an individual performing service for it (including any amount paid by an employer for insurance or annuities or into a fund to provide for any such payment) on account of retirement.

(4) The amount of any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability made by an employer to, or on behalf of, an individual performing services for it and after the expiration of six (6) calendar months following the last calendar month in which the individual performed services for such employer.

(5) The amount of any payment made by an employer to, or on behalf of, an individual performing services for it or to ~~his~~ **the individual's** beneficiary:

- (A) from or to a trust exempt from tax under Section 401(a) of the Internal Revenue Code at the time of such payment unless such payment is made to an individual performing services for the trust as remuneration for such services and not as a beneficiary of the trust; or
- (B) under or to an annuity plan which, at the time of such

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payments, meets the requirements of Section 401(a)(3), 401(a)(4), 401(a)(5), and 401(a)(6) of the Internal Revenue Code.

(6) Remuneration paid in any medium other than cash to an individual for service not in the course of the employer's trade or business.

(7) The amount of any payment (other than vacation or sick pay) made to an individual after the month in which ~~he~~ **the individual** attains the age of sixty-five (65) if ~~he~~ **the individual** did not perform services for the employer in the period for which such payment is made.

(8) The payment by an employer (without deduction from the remuneration of the employee) of the tax imposed upon an employee under Sections 3101 et seq. of the Internal Revenue Code (Federal Insurance Contributions Act).

SECTION 2. IC 22-4-8-3.5 IS ADDED TO THE INDIANA CODE AS A **NEW SECTION TO READ AS FOLLOWS** [EFFECTIVE JULY 1, 2005]: **Sec. 3.5. As used in this article, "employment" does not include an owner-operator that provides a motor vehicle and the services of a driver to a motor carrier under a written contract that is subject to IC 8-2.1-24-22, 45 IAC 16-1-13, or 49 CFR 376.**

SECTION 3. IC 22-4-9-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. Except as otherwise provided in **sections 4 and 5 of this chapter**, IC 22-4-7-2(f), ~~IC 22-4-9-4~~, and ~~IC 22-4-9-5~~, **IC 22-4-11.5**, an employing unit shall cease to be an employer subject to this article only as of January 1 of any calendar year, if it files with the commissioner, prior to January 31 of such year, a written application for termination of coverage, and the commissioner finds that the employment experience of the employer within the preceding calendar year was not sufficient to qualify an employing unit as an employer under IC 22-4-7-1 and IC 22-4-7-2.

SECTION 4. IC 22-4-9-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 3. **(a) This section is subject to the provisions of IC 22-4-11.5.**

**(b)** Any employer subject to ~~the~~ **this** article as successor to an employer pursuant to the provisions of ~~Subsections (a) or (b) of IC 1971, 22-4-7-2~~ **IC 22-4-7-2(a) or IC 22-4-7-2(b) hereof** shall cease to be an employer at the end of the year in which the acquisition occurs only if the board finds that within such calendar year the employment experience of the predecessor prior to the date of disposition combined with the employment experience of the successor subsequent to the date of acquisition would not be sufficient to qualify the successor

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employer as an employer under the provisions of ~~IC 1971, 22-4-7-1~~. ~~Provided, that~~ **IC 22-4-7-1**. No such successor employer may ~~ceased~~ **cease** to be an employer subject to this article at the end of the first year of the current period of coverage of the predecessor employer. If all of the resources and liabilities of the experience account of an employer are assumed by another in accordance with the provisions of ~~IC 1971, 22-4-10-6~~ **IC 22-4-10-6** or **IC 22-4-10-7**, ~~hereof~~ such employer's status as employer and under this article is hereby terminated unless and until such employer subsequently qualifies under the provisions of ~~IC 1971, 22-4-7-1~~ **IC 22-4-7-1** or **IC 22-4-7-2** ~~hereof~~ or elects to become an employer under ~~IC 1971, 22-4-9-4 or 22-4-9-5~~. **sections 4 or 5 of this chapter.**

(c) If no application for termination, as herein provided, is filed by an employer ~~and/or if~~ **and** four (4) full calendar years have elapsed since any contributions have become payable from such employer, then and in such cases the board may terminate such employer's experience account.

SECTION 5. IC 22-4-9-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 5. An employing unit for which services, as specifically excluded by IC 22-4-8-3 **or IC 22-4-8-3.5**, are performed, may file with the commissioner its written election to consider all such services for such employing unit in one (1) or more distinct establishments, as employment for all purposes of this article for not less than two (2) calendar years. Upon written approval of such election by the commissioner, such services shall be deemed to constitute employment subject to this article as of the date stated in such approval and shall cease to be deemed employment subject hereto as of January 1 of any calendar year subsequent to such two (2) calendar years only if prior to January 31 it has filed with the commissioner a written notice to that effect.

SECTION 6. IC 22-4-10-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 6. (a) When:

- (1) an employing unit (whether or not an employing unit at the time of the acquisition) becomes an employer under IC 22-4-7-2(a); ~~or when~~
- (2) an employer acquires the organization, trade, or business, or substantially all the assets of another employer; **or**
- (3) **an employer transfers all or a portion of the employer's trade or business (including the employer's workforce) to another employer as described in IC 22-4-11.5-7;**

the successor employer shall, in accordance with the rules prescribed by the board, assume the position of the predecessor with respect to all

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the resources and liabilities of the predecessor's experience account.

(b) ~~Effective July 1, 1975, Except as provided by IC 22-4-11.5,~~  
when:

(1) an employing unit (whether or not an employing unit at the time of the acquisition) becomes an employer under IC 22-4-7-2(b); or ~~when~~

(2) an employer acquires a distinct and segregable portion of the organization, trade, or business within this state of another employer;

the successor employer shall ~~upon application and agreement by and between the disposing and acquiring employers;~~ assume the position of the predecessor employer with respect to the portion of the resources and liabilities of the predecessor's experience account as pertains to the distinct and segregable portion of the predecessor's organization, trade, or business acquired by the successor. ~~However, the An application and agreement~~ for the acquiring employer to assume this portion of the resources and liabilities of the disposing employer's experience account must be filed with the commissioner on prescribed forms not later than one hundred fifty (150) days immediately following the disposition date or not later than ten (10) days after the disposing and acquiring employers are mailed or otherwise delivered final notice that the acquiring employer is a successor employer, whichever is the earlier date. This portion of the resources and liabilities of the disposing employer's experience account ~~if transferred;~~ shall be transferred in accordance with ~~rules prescribed by the board.~~ **IC 22-4-11.5.**

(c) **Except as provided by IC 22-4-11.5,** the successor employer, if an employer prior to the acquisition, shall pay at the rate of contribution originally assigned to it for the calendar year in which the acquisition occurs, until the end of that year. If not an employer prior to the acquisition, the successor employer shall pay the rate of two and seven-tenths percent (2.7%) unless the successor employer assumes all or part of the resources and liabilities of the predecessor employer's experience account, in which event the successor employer shall pay at the rate of contribution assigned to the predecessor employer for the period starting with the first day of the calendar quarter in which the acquisition occurs, until the end of that year. However, if a successor employer, not an employer prior to the acquisition, simultaneously acquires all or part of the experience balance of two (2) or more employers, the successor employer shall pay at the highest rate applicable to the experience accounts totally or partially acquired for the period starting with the first day of the calendar quarter in which the acquisition occurs, until the end of the year. If the successor

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employer had any employment prior to the date of acquisition upon which contributions were owed under IC 22-4-9-1, ~~his~~ **the employer's** rate of contribution from the first of the year to the first day of the calendar quarter in which the acquisition occurred would be two and seven-tenths percent (2.7%).

SECTION 7. IC 22-4-10-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 7. **(a) Except as provided by IC 22-4-11.5**, when an employing unit (whether or not an employing unit prior thereto) assumes all of the resources and liabilities of the experience account of a predecessor employer, as provided in ~~IC 1971, 22-4-10-6 hereof~~ **section 6 of this chapter**, amounts paid by such predecessor employer shall be deemed to have been so paid by such successor employer. The experience of such predecessor with respect to unemployment risk, including but not limited to past payrolls and contributions, shall be credited to the account of such successor.

**(b)** The payments of benefits to an individual shall not in any case be denied or withheld because the experience account of an employer does not reflect a balance and total of contributions paid to be in excess of benefits charged to such experience account.

SECTION 8. IC 22-4-11-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. **(a) Except as provided in IC 22-4-11.5**, the commissioner shall for each year determine the contribution rate applicable to each employer.

**(b)** The balance shall include contributions with respect to the period ending on the computation date and actually paid on or before July 31 immediately following the computation date and benefits actually paid on or before the computation date and shall also include any voluntary payments made in accordance with IC 22-4-10-5:

(1) for each calendar year, an employer's rate shall be determined in accordance with the rate schedules in section 3 **or 3.3** of this chapter; and

(2) for each calendar year, an employer's rate shall be two and seven-tenths percent (2.7%), except as otherwise provided in IC 22-4-37-3, unless and until:

(A) the employer has been subject to this article throughout the thirty-six (36) consecutive calendar months immediately preceding the computation date; and

(B) there has been some annual payroll in each of the three (3) twelve (12) month periods immediately preceding the computation date.

**(c)** In addition to the conditions and requirements set forth and provided in subsection (b)(2)(A) and (b)(2)(B), an employer's rate shall

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not be less than five and four-tenths percent (5.4%) unless all required contribution and wage reports have been filed within thirty-one (31) days following the computation date and all contributions, penalties, and interest due and owing by the employer or ~~his~~ **the employer's** predecessors for periods prior to and including the computation date have been paid:

- (1) within thirty-one (31) days following the computation date; or
- (2) within ten (10) days after the commissioner has given the employer a written notice by registered mail to the employer's last known address of:

- (A) the delinquency; or

- (B) failure to file the reports;

whichever is the later date.

The board or the board's designee may waive the imposition of rates under this subsection if the board finds the employer's failure to meet the deadlines was for excusable cause. The commissioner shall give written notice to the employer before this additional condition or requirement shall apply.

(d) However, if the employer is the state or a political subdivision of the state or any instrumentality of a state or a political subdivision, or any instrumentality which is wholly owned by the state and one (1) or more other states or political subdivisions, the employer may contribute at a rate of one percent (1%) until it has been subject to this article throughout the thirty-six (36) consecutive calendar months immediately preceding the computation date.

(e) On the computation date every employer who had taxable wages in the previous calendar year shall have the employer's experience account charged with the amount determined under the following formula:

STEP ONE: Divide:

- (A) the employer's taxable wages for the preceding calendar year; by

- (B) the total taxable wages for the preceding calendar year.

STEP TWO: Multiply the quotient determined under STEP ONE by the total amount of benefits charged to the fund under section 1 of this chapter.

(f) One (1) percentage point of the rate imposed under subsection (c) or the amount of the employer's payment that is attributable to the increase in the contribution rate, whichever is less, shall be imposed as a penalty that is due and shall be deposited upon collection into the special employment and training services fund established under IC 22-4-25-1. The remainder of the contributions paid by an employer

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pursuant to the maximum rate shall be:

- (1) considered a contribution for the purposes of this article; and
- (2) deposited in the unemployment insurance benefit fund established under IC 22-4-26.

SECTION 9. IC 22-4-11.5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]:

**Chapter 11.5. Assignment of Employer Contribution Rates and Transfers of Employer Experience Accounts**

**Sec. 1.** Notwithstanding any other provision of this article, this chapter applies to the assignment of contribution rates and transfers of employer experience accounts after December 31, 2005.

**Sec. 2.** As used in this chapter, "administrative law judge" means a person appointed by the commissioner under IC 22-4-17-4.

**Sec. 3.** As used in this chapter, "person" has the meaning set forth in section 7701(a)(1) of the Internal Revenue Code.

**Sec. 4.** As used in this chapter, "trade or business" includes an employer's workforce.

**Sec. 5.** As used in this chapter, "violates or attempts to violate" includes:

- (1) the intent to evade;
- (2) misrepresentation; or
- (3) willful nondisclosure.

**Sec. 6.** As used in this chapter:

- (1) "knowingly" has the meaning set forth in IC 35-41-2-2(b); and
- (2) "recklessly" has the meaning set forth in IC 35-41-2-2(c).

**Sec. 7. (a)** If:

- (1) an employer transfers all or a portion of the employer's trade or business to another employer; and
- (2) at the time of the transfer, the two (2) employers have substantially common ownership, management, or control;

the successor employer shall assume the experience rating of the predecessor employer for the resources and liabilities of the predecessor employer's experience account that are attributable to the transfer.

(b) The contribution rates of both employers shall be recalculated and made effective on the date that the transfer described in subsection (a) is effective.

(c) The experience account balance and the payroll of the

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predecessor employer on the date of the transfer, and the benefits chargeable to the predecessor employer's original experience account after the date of the transfer, must be divided between the predecessor employer and the successor employer in accordance with rules adopted by the department under IC 4-22-2.

(d) Any written determination made by the department is conclusive and binding on both the predecessor employer and the successor employer unless one (1) or both employers file with the department a written protest setting forth the grounds and reasons for the protest. A protest under this section must be filed not later than ten (10) days after the date the department mails the initial determination to the employing units. The protest shall be heard and determined under this section and IC 22-4-32-1 through IC 22-4-32-15. Both the predecessor employer and successor employer shall be parties to the hearing before the administrative law judge and are entitled to receive copies of all pleadings and the decision.

Sec. 8. (a) If the department determines that an employing unit or other person that is not an employer under IC 22-4-7 at the time of the acquisition has acquired an employer's trade or business solely for the purpose of obtaining a lower employer contribution rate, the employing unit or other person:

- (1) may not assume the experience rating of the predecessor employer for the resources and liabilities of the predecessor employer's experience account that are attributable to the acquisition; and
- (2) shall pay the applicable contribution rate as determined under this chapter.

(b) In determining whether an employing unit or other person acquired a trade or business solely for the purpose of obtaining a lower employer contribution rate under subsection (a), the commissioner shall consider the following:

- (1) The cost of acquiring the trade or business.
- (2) Whether the employing unit or other person continued the business enterprise of the acquired trade or business.
- (3) The length of time the employing unit or other person continued the business enterprise of the acquired trade or business.
- (4) Whether a substantial number of new employees were hired to perform duties unrelated to the business enterprise that the trade or business conducted before the trade or business was acquired.

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(c) If the commissioner makes an initial determination that a violation of this chapter has occurred, the commissioner shall promptly refer the matter to an administrative law judge for a hearing and decision under this article.

**Sec. 9. A person who knowingly or recklessly:**

(1) violates or attempts to violate:

(A) section 7 or 8 of this chapter; or

(B) any other provision of this article related to determining the assumption or assignment of an employer's contribution rate; or

(2) advises another person in a way that results in a violation of:

(A) section 7 or 8 of this chapter; or

(B) any other provision of this article related to determining the assumption or assignment of an employer's contribution rate;

commits a Class C misdemeanor.

**Sec. 10. (a)** In addition to any other penalty imposed, a person is subject to a civil penalty under this chapter.

**(b)** This subsection applies to a person who is an employer (as defined in IC 22-4-7). If an administrative law judge determines that a person is subject to a civil penalty under subsection (a), the administrative law judge shall assign an employer contribution rate equal to one (1) of the following as a civil penalty:

(1) The highest employer contribution rate assignable under this article for:

(A) the year in which the violation occurred; and

(B) the following three (3) years.

(2) An employer contribution rate of two percent (2%) of the employer's taxable wages (as defined in IC 22-4-4-2) for the year in which the violation occurred and the following three (3) years, if:

(A) an employer is already paying the highest employer contribution rate at the time of the violation; or

(B) the increase in the contribution rate described in subdivision (1) is less than two percent (2%).

**(c)** This subsection applies to a person who is not an employer (as defined in IC 22-4-7-1 or IC 22-4-7-2). If an administrative law judge determines that a person is subject to a civil penalty under subsection (a), the administrative law judge shall assess a civil penalty of not more than five thousand dollars (\$5,000).

**(d)** All civil penalties collected under this section shall be

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deposited in the unemployment insurance benefit fund established by IC 22-4-26-1.

**Sec. 11. (a) The commissioner shall establish procedures to identify the transfer or acquisition of a business for purposes of this chapter.**

**(b) The interpretation and application of this chapter must meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.**

**SECTION 10. [EFFECTIVE JULY 1, 2005] (a) 646 IAC 3-4-10 is void after December 31, 2005. The publisher of the Indiana Administrative Code and Indiana Register shall remove this section from the Indiana Administrative Code after that date.**

**(b) Before January 1, 2006, the department of workforce development shall adopt rules concerning transfers of a portion of a trade or business under IC 22-4-11.5-7, as added by this act, including the division between the predecessor employer and the successor employer of:**

- (1) the experience account balance of the predecessor employer;**
- (2) the payroll of the predecessor employer; and**
- (3) the benefits chargeable to the predecessor employer's original experience account after the date of the transfer.**

**(c) This SECTION expires January 1, 2006.**

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President of the Senate

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President Pro Tempore

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Speaker of the House of Representatives

Approved: \_\_\_\_\_

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Governor of the State of Indiana

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